Endnotes

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Heffernan v. City of Paterson: Watering Down the First Amendment Retaliation Doctrine to Create a Perception of Protection for Public Employees

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HEFFERNAN v. CITY OF PATERSON: WATERING DOWN THE FIRST AMENDMENT RETALIATION DOCTRINE TO CREATE A PERCEPTION OF PROTECTION FOR PUBLIC EMPLOYEES

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In *Heffernan v. City of Paterson*,[1] the Supreme Court evaluated whether an employee's First Amendment[2] retaliation claim can survive if the employer believes that the employee engaged in protected First Amendment conduct, but the employee did not in fact do so.[3] The Court analyzed a police department's demotion of an officer based on its mistaken perception that he participated in protected political activity.[4] Without reaching the merits of the case, the Court held that a decision motivated by a perceived exercise of First Amendment conduct might violate the Constitution.[5] While the Court justly ruled in the plaintiff's favor,[6] the majority imprudently decided the case based on unreliable precedent, without fully explaining the impact of its holding.[7] In the face of a circuit split surrounding the issue,[8] the Court missed an opportunity to formally adopt a perceived affiliation approach by expanding on its firmly established political affiliation case law.[9] As a result, the Court failed to establish a clear method for approaching future First Amendment public employment retaliation cases despite attractive and intuitive options.[10] Thus, while *Heffernan* undoubtedly represents a victory for public employees' First Amendment rights, it may prove to be a hollow victory over time if future courts fail to build on *Heffernan*'s fragile foundations.[11]

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1. 136 S. Ct. 1412 (2016).
2. U.S. CONST. amend. I.
3. *See infra* Part III.
4. *See infra* Part III.
5. *See infra* Part III.
6. *See infra* Part IV.A.
7. *See infra* Part IV.B.
8. *See infra* Part II.C.
9. *See infra* Part IV.B.
10. *See infra* Part IV.C.
11. *See infra* Part IV.C.

I. THE CASE

On April 13, 2006, a bedridden New Jersey mother made a simple request of her son: to replace a campaign sign for a mayoral candidate, Lawrence Spagnola, that had recently been stolen from her lawn.[12] The son, Detective Jeffrey Heffernan of the Paterson Police Department, obliged and contacted the Spagnola campaign to arrange to pick up the sign.[13] While at the campaign headquarters, another police officer observed Heffernan's brief encounter with Spagnola's campaign manager.[14] Word of Heffernan's presence at the headquarters spread quickly.[15] When his supervisor confronted him the following day, Detective Heffernan denied any political involvement.[16] Nevertheless, because of his perceived involvement in the Spagnola campaign, his supervisor demoted him.[17]

Shortly after, Heffernan filed a Section 1983[18] action for unconstitutional retaliation under the First Amendment in the U.S. District Court for the District of New Jersey against the City of Paterson, then-Mayor Jose Torres, Police Chief James Wittig, and Police Administrator Michael Walker.[19] Specifically, Heffernan stated claims for a retaliatory demotion based on Heffernan's exercise of the right to freedom of speech and retaliatory demotion based on his exercise of the right to freedom of association.[20] After a complex procedural history, including a vacated trial verdict in favor of Heffernan, the district court granted summary judgment in favor of the defendants.[21]

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12. Heffernan v. City of Paterson, 777 F.3d 147, 149–50 (3d Cir. 2014), *rev'd and remanded*, 136 S. Ct. 1412 (2016).

13. *Id.* at 150. At the time of the incident, Heffernan was a detective assigned to administrative detail in the office of the Chief of Police, James Wittig. *Id.* at 149. Spagnola, a former Paterson police chief and personal friend of Heffernan, was running against the incumbent mayor at the time, Jose Torres. *Id.* at 149–50.

14. *Id.* at 150.

15. *Id.*

16. *Id.* To no avail, Heffernan attempted to explain that he only acted to help his sick mother. *Id.*

17. *Id.*

18. 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .).

19. Heffernan v. City of Paterson, 2 F. Supp. 3d 563, 566–68 (D.N.J. 2014), *aff'd*, 777 F.3d 147 (3d Cir. 2014), *rev'd and remanded*, 136 S. Ct. 1412 (2016).

20. *Id.* at 569.

21. *Heffernan*, 777 F.3d at 150–51. After resolving cross-motions for summary judgment, the case proceeded to trial on the free-association claim alone, resulting in a verdict of $105,000 in favor of Heffernan. *Id.* at 150. The presiding judge later discovered a personal conflict of interest, removed himself from the case and vacated the verdict. *Id.* Upon reassignment, the court granted summary judgment in favor of the defendants on the free-expression claim, but failed to rule on the free-association claim. *Id.* The Third Circuit concluded that the district court erred in granting

The district court found that Heffernan failed to produce evidence that he actually exercised his First Amendment rights.[22] Heffernan admitted, in fact, that he did not engage in actual speech or expression and, as a result, the court rejected his free speech claim and granted the defendants' motions for summary judgment.[23] Similarly, because Heffernan expressly denied any political affiliation with the Spagnola campaign, the district court rejected his free association claim.[24] Further, the district court also barred Heffernan from advancing arguments based on perceived speech and affiliation.[25] Heffernan argued that a viable First Amendment claim existed based on his employer's mistaken belief that he engaged in protected speech or affiliation, referred to as a "perceived affiliation" claim.[26] The court rejected this claim as well.[27]

On appeal to the U.S. Court of Appeals for the Third Circuit, Heffernan argued that the district court improperly granted summary judgment on his free association and free speech claims.[28] Echoing the lower court, the Third Circuit held that Heffernan's lack of actual speech or association proved fatal to his claims.[29] Although the court recognized that his actions could have had the effect of assisting the Spagnola campaign, by Heffernan's own testimony, this was not his intent.[30] By admitting that his actions lacked a political motivation, Heffernan failed to raise a genuine issue of material fact, warranting a grant of summary judgment against him on this theory.[31]

The Third Circuit also addressed Heffernan's theory of "perceived support."[32] Heffernan again argued that despite his lack of actual First Amendment speech or conduct, his case should still go to trial because his superiors

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summary judgment and remanded the case, with instructions to address the free-association claim and allow the parties to file briefs in opposition. *Id.* The parties again filed cross-motions for summary judgment. *Id.*

22. *Heffernan*, 2 F. Supp. 3d at 573–74.

23. *Id.* at 576.

24. *Id.* at 580. The district court noted that Heffernan was not a resident of Paterson and could not vote in its elections. *Id.* at 579. Heffernan was a personal friend of Spagnola and had testified that "he had no political connection to Spagnola." *Id.*

25. *Id.* at 575, 580.

26. *See id.* at 575 ("Under the law of this Circuit, there can be no retaliation claim based on an employer's mere perception that the plaintiff has engaged in protected speech or expression.").

27. *Id.* at 583.

28. *Heffernan*, 777 F.3d at 151–52.

29. *See id.* at 152–53 (affirming on the same grounds after noting that the district court "recognized" the problem with Heffernan's theory).

30. *See id.* (stating that "Heffernan repeatedly disavowed anything resembling" political speech and restated that he was only picking up a sign for his mother).

31. *Id.* at 153 ("In other words, Heffernan asks us to eliminate a traditional element of a First Amendment retaliation claim—namely, the requirement that the plaintiff in fact exercised a First Amendment right.").

32. *Id.* at 153–54.

believed that he had engaged in political speech and acted on that mistaken belief.[33] The Third Circuit, however, had previously rejected perceived conduct theories for First Amendment retaliation cases so, bound by precedent, it rejected this argument and affirmed the district court's decision.[34] The court emphatically held that "a free-speech retaliation claim is actionable under [Section] 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights."[35] Because Heffernan did not actually associate or, at minimum, take a stance of "calculated" political neutrality, the court explained the police department's reaction to a mistaken belief could not amount to a constitutional violation.[36] The Supreme Court granted certiorari to Heffernan's appeal to determine whether the Third Circuit erred in rejecting his "perceived support" theory.[37]

II. LEGAL BACKGROUND

The government possesses more authority as an employer than as sovereign.[38] It is still capable, however, of infringing on its employees' constitutionally protected fundamental rights. Part II.A of this Note explores early understandings of the government's ability to condition the terms of public employment. Part II.B then examines judicial developments throughout the mid-twentieth century, which expanded the rights of public employees with respect to both free speech and political association. Part II.C subsequently addresses the different approaches federal courts have applied to First Amendment retaliation cases involving public employees.

A. Until the Mid-Twentieth Century, Government Employers Possessed Vast Authority to Condition Public Employment

For most of the twentieth century, courts afforded the government wide latitude to condition public employment.[39] Inspired by then-Massachusetts Supreme Court Justice Oliver Wendell Holmes' "classic formulation" of the

33. *Id.*

34. *Id.* (citing Ambrose v. Township of Robinson, 303 F.3d 488, 496 (3d Cir. 2002); Fogarty v. Bowles, 121 F.3d 886, 619 (3d Cir. 1997)); *see infra* Part II.C.3.

35. *Heffernan*, 777 F.3d at 153 (first citing *Ambrose*, 303 F.3d at 496; then citing *Fogarty*, 121 F.3d at 619).

36. *Id.* at 154. The court did concede that Heffernan's choice to remain politically neutral may have been protected, but that a politically apathetic posture was not. *Id.*

37. Heffernan v. City of Paterson, 136 S. Ct. 29 (2015) (mem.).

38. *See* Waters v. Churchill, 511 U.S. 661, 671 (1994) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.").

39. *See* Connick v. Myers, 461 U.S. 138, 143 (1983) ("For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment").

notion that "[{a} policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"[40] the pre-1967 Supreme Court consistently allowed governmental intrusions on public employees' First Amendment rights. For example, in 1951, the Court permitted municipalities to extract an oath from employees that they were not members of the Communist Party.[41] Additionally, the Court upheld laws barring public school teachers from membership in organizations, such as the Communist Party, that were founded on subversive and illegal goals, regardless of the employees' intentions to actually carry out those goals.[42] More generally, the Court also upheld the Hatch Act,[43] which forbade federal employees from taking active part in political management and campaigning.[44] Underpinning these decisions was the idea that a citizen had no right to public employment, and therefore, could not protest the conditions of employment.[45]

In 1967, however, the Court reversed track in the landmark decision *Keyishian v. Board of Regents*.[46] In *Keyishian*, the Court held that "[m]ere knowing membership" in the Communist Party could not furnish an adequate basis for a public employee's dismissal.[47] Just five years later, the Court held that a teacher could not be terminated for publicly criticizing the Board of Regents in charge of the school.[48] The Court explained its departure from the previously near absolute protection of government employers, proclaiming that "even though a person has no 'right' to [public employment] and even though the government may deny [it] for any number of reasons,"[49] the government may not deny employment on a basis that infringes on a person's

40. *Id.* at 143–44 (alteration in original) (quoting McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892)).

41. *See* Garner v. Los Angeles Bd. of Pub. Works, 341 U.S. 716, 720–21 (1951) (permitting the government to require oaths and affidavits disclaiming membership in the Communist Party for employment).

42. *See* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (upholding a ban on communists as government employees).

43. *See* An Act to Prevent Pernicious Political Activities, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (current version at 5 U.S.C. § 7324 (2012)) (officially titled the Hatch Act).

44. *See* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 551 (1973) (upholding the Hatch Act); United Public Workers v. Mitchell, 330 U.S. 75, 93 (1947) (same); *see also Ex parte* Curtis, 106 U.S. 371, 375 (1882) (upholding the prohibition forbidding federal employees from giving or taking money for political purposes to other government employees).

45. *See, e.g.*, McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

46. 385 U.S. 589 (1967).

47. *Id.* at 606.

48. Perry v. Sindermann, 408 U.S. 593, 598 (1972).

49. *Id.* at 597.

First Amendment rights.[50] Through these decisions, the Court planted seeds for First Amendment public employment protections to blossom in years to come.

B. The Court Has Extended Protection to a Public Employee's Free Association and Free Speech Rights

1. Government May Not Make Adverse Employment Decisions Solely Based on Political Affiliation Under the First Amendment

As First Amendment jurisprudence progressed, the Court addressed specific government practices, such as political patronage,[51] and strengthened rights for public employees. Resting on *Keyishian* and *Perry*, a plurality of the Court in *Elrod v. Burns*[52] held that public employees could not be discharged solely on the basis of political affiliation.[53] While the Court recognized the historical role of patronage practices,[54] the plurality held that "to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."[55] Evaluating the proffered governmental interests in retaining patronage dismissals,[56] the plurality held that patronage dismissals are valid only if limited to policymaking employees.[57]

50. *Id.*; *see also id.* ("For if the government could deny [public employment] to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.").

51. *See* Elrod v. Burns, 427 U.S. 347, 353–54 (1976) (detailing the history of political patronage). Political patronage was the tradition of placing loyal party supporters in government jobs made available by firing members of the opposing party when the new party took office. *Id.* at 353. Patronage had existed at the federal level since Thomas Jefferson's presidency, and became popularized and legitimized by the Andrew Jackson administration. *Id.* While political patronage took many forms, the *Elrod* Court only addressed dismissal of government employees for purely partisan reasons. *Id.*

52. 427 U.S. 347 (1976).

53. *Id.* at 373.

54. *See id.* at 353–55 (discussing the history of patronage practices throughout American history).

55. *Id.* at 363.

56. The government offered three interests to justify the use of patronage dismissals: government effectiveness and efficiency; political loyalty of employees so as to avoid the obstruction of implementing certain policy choices of the controlling party; and the preservation of the democratic process. *Id.* at 364–73.

57. *Id.* at 372. The plurality held that patronage dismissals were not the least restrictive means for furthering government efficiency or preserving the democratic process. *Id.* Insuring party loyalty, so as to effectively implement the wishes of the electorate, was the only interest in which patronage dismissals could be justified, if limited to only policymaking employees. *Id.*; *see also id.*

Four years later, the Court reaffirmed *Elrod*'s holding and provided clarity to the doctrine. In *Branti v. Finkel*,[58] the Court held that assistant public defenders could not be dismissed solely based on their party affiliation.[59] The Court eliminated the policymaker distinction and reconstructed the inquiry to focus on "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[60] The new standard would allow government employers to terminate an employee only where an employee's private political beliefs would interfere with the discharge of the employee's duties and disrupt the government's compelling interest in efficiency.[61] Furthermore, in *Rutan v. Republican Party*,[62] the Court extended these standards to other employment decisions, including the "promotion, transfer, recall or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement."[63] Thus, unless the government can show that party affiliation is "an appropriate requirement for the effective performance of the public office involved,"[64] adverse employment actions based solely on party affiliation violate the First Amendment's right to free association.

2. Government May Not Make Adverse Employment Decisions Based on an Employee's Speech on a Matter of Public Concern

In addition to associational rights, the Supreme Court has also extended First Amendment free speech protections to public employees where the employee speaks as a citizen on a matter of public concern.[65] In *Pickering v. Board of Education*,[66] the Court held that "a teacher's exercise of his right to

at 375 (Stewart, J., concurring) (agreeing with the plurality that "a nonpolicymaking, nonconfidential government employee can[not] be discharged . . . from a job that he is satisfactorily performing upon the sole ground of his political beliefs").

58. 445 U.S. 507 (1980).

59. *Id.* at 518–19.

60. *Id.* at 518. The Court also held that "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing . . . their political allegiance." *Id.* at 517.

61. *Id.*

62. 497 U.S. 62 (1990).

63. *Id.* at 68, 76; *see also* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 714–15 (1996) (extending First Amendment protections enjoyed by public employees to independent contractors contracting with the State).

64. *Branti*, 445 U.S. at 518. Courts evaluate this party affiliation requirement under a reasonableness standard. *O'Hare Truck Serv.*, 518 U.S. at 719.

65. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (declaring that statements made pursuant to official job duties are not matters of public concern); Connick v. Myers, 461 U.S. 138 (1983) (requiring speech to touch on matters of public concern before obtaining First Amendment protection); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (establishing a balancing test to evaluate the weight of government interests against public employees' First Amendment rights).

66. 391 U.S. 563 (1968).

speak on issues of public importance may not furnish the basis for his dismissal from public employment."[67] The Court applied a balancing test, which weighed the interests of the employee "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[68] Ruling for the teacher, the Court expressed concern over the potential dangers posed to free speech if dismissals from public employment based on speech went unchallenged.[69] Thus, the *Pickering* Court established that when a public employee speaks as a citizen on a matter of public concern, the government employer may not discipline the employee unless the government's interest in promoting efficient public service outweighs the First Amendment content at stake.[70]

Later, in *Connick v. Myers*,[71] the Court elaborated on how to apply the *Pickering* test. In *Connick*, the Court held that the termination of an assistant district attorney due to her distribution of inflammatory questionnaires to her co-workers, which asked their opinion on the operation of the office, did not warrant First Amendment protection.[72] Seizing this opportunity to clarify *Pickering*'s rule, the Court attempted to define when speech touched on "matter[s] of public concern."[73] The Court held that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community,"[74] the speech does not address a public concern.[75] Moreover, the Court cautioned that if employee speech does not touch

67. *Id.* at 574.

68. *Id.* at 568; *see also id.* at 573 ("[W]e conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.").

69. *See id.* at 574.

70. *Id.* at 568. This test resembles, albeit without any balancing features, the affiliation dismissal test as described by the Court in *Branti v. Finkel*. *See* 445 U.S. 507, 517 (1980) (holding that government employers may not terminate employees for partisan purposes unless party membership was necessary to effectively perform the job at issue).

71. 461 U.S. 138 (1983).

72. *Id.* at 147–48. The Court did note that Myers's speech may have touched public concerns in an extremely narrow way, but could be best characterized as an employee grievance, rendering judicial intervention inappropriate. *Id.* at 154.

73. *Id.* at 146–54.

74. *Id.* at 146.

75. *Id.*; *see also id.* at 147. The Court reasoned:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id.

on a "matter of public concern, it is unnecessary [for the judiciary] . . . to scrutinize the reasons for [the employee's] discharge."[76]

Later, in *Garcetti v. Ceballos*,[77] the Court rejected an assistant district attorney's First Amendment claim where, after writing a critical memorandum questioning the validity of an affidavit of probable cause, his supervisor terminated him.[78] The Court reasoned that public employees do not speak as private citizens in communications made in the course of their official duties.[79] Reaffirming the principles of *Connick*, the Court held that an employee speaking pursuant to his or her official job duties does not receive protection from the First Amendment[80]; rather, employers retain the right to review an employee's official communications and "take proper corrective action" when necessary.[81]

In sum, when a public employee speaks as a citizen on a matter of public concern, and not pursuant to his or her official governmental duties, the government-employer cannot discipline the employee for exercising his or her First Amendment rights.

C. Different Approaches Exist When Evaluating First Amendment Retaliation Cases

To succeed on a First Amendment retaliation claim, a plaintiff must "prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination."[82] Once the employee meets this burden, the government still may avoid liability if it can show the termination still would have occurred without the protected conduct or some legitimate government interest outweighed the First Amendment considerations.[83] Due to uncertainty in doctrinal principles, courts have struggled with the how to define the parameters of which actions or inactions merit protection.[84] Moreover, a lack of uniformity regarding where to place analytical emphasis has led to inconsistent results across jurisdictions.[85]

76. *Id.* at 146.
77. 547 U.S. 410 (2006).
78. *Id.* at 414–17.
79. *Id.* at 421.
80. *Id.*
81. *Id.* at 422–23.
82. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996).
83. *Id.* (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).
84. *See infra* Parts II.C.2–3.
85. *See infra* Parts II.C.2–3.

1. The Supreme Court Has Opened the Possibility of Focusing Solely on Employer Intent

In *Waters v. Churchill*,[86] a plurality of the Supreme Court recognized that "[g]overnment action based on protected speech may . . . violate the First Amendment even if the government actor honestly believes the speech is unprotected."[87] The plurality called for public employers to conduct a reasonable inquiry into the speech at issue and determine whether the First Amendment protects the statements or conduct.[88] If after conducting the inquiry, the public employer reasonably believes that the speech was not protected by the First Amendment, they may escape liability.[89] However, the same employers may be liable if they find the employee's speech or conduct to be protected and retaliated all the same.[90] By formulating the inquiry in this way, the plurality suggested that the government's motives for pursuing a given employment action should be the focus of a reviewing court.[91] Thus, the plurality chose to focus on the employer's subjective knowledge of an employee's actions rather than the content of the actual employee conduct at issue.[92] In the years following *Waters*, circuit courts have applied this logic in two contradictory ways, with particular emphasis on political affiliation.

2. Some Circuits Have Opened the Door for Perceived Affiliation Claims While Others Interpret Waters *to Prevent These Claims*

In 2008, the Tenth Circuit held that a public employee does not have to show active support for a particular candidate in an election to state a claim for retaliation based on affiliation, in *Gann v. Cline*.[93] The plaintiff in *Gann* alleged that her political neutrality resulted in her termination because her boss perceived this neutrality as political opposition.[94] Instead of requiring the plaintiff to show active political conduct, the court believed that the "only relevant consideration is the impetus for the [employer's] decision."[95] Thus,

86. 511 U.S. 661 (1994).

87. *Id.* at 669.

88. *Id.* at 677–79.

89. *Id.*; *see also id.* at 682 (Souter, J., concurring) ("[A] public employer who reasonably believes . . . that an employee engaged in constitutionally unprotected speech may punish the employee . . . even if it turns out that the employee's actual remarks were constitutionally protected.").

90. *Id.*

91. *Id.* at 677–78 (plurality opinion).

92. *Id.* Because the issue of a factual mistake presented a novel question to the *Waters* Court, Justice O'Connor, writing for the plurality, stated that, for the time being, a "case-by-case" approach should be adopted "until some workable general rule emerges." *Id.* at 671. This Note contends that *Heffernan* presented the opportunity for said general rule to emerge. *See infra* Part IV.

93. *See* 519 F.3d 1090, 1094 (10th Cir. 2008) (describing whether the plaintiff actively engaged in protected behavior as "irrelevant").

94. *Id.*

95. *Id.*

similar to *Waters* and consistent with the *Elrod* line of cases, the Tenth Circuit focused squarely on employer motive in an affiliation context.[96]

Later that year, the First Circuit followed suit.[97] In *Welch v. Ciampa*,[98] a police chief demoted a detective for not supporting his campaign to win a recall election.[99] Although the plaintiff could not show he engaged in any conduct apart from political neutrality, the court held that "[w]hether [the detective] actually affiliated himself . . . is not dispositive since the [police chief] attributed to him that affiliation."[100] Once more a court found that First Amendment activity may help a plaintiff's case, but it is not required to state a claim.[101]

With perhaps the strongest endorsement of this approach, in *Dye v. Office of the Racing Commission*,[102] the Sixth Circuit recognized perceived affiliation, relying on *Waters*, *Gann*, and *Welch*.[103] After evaluating the different approaches to perceived affiliation claims, the court adopted the rationale of the First and Tenth Circuits, holding that "retaliation based on perceived political affiliation is actionable under the political-affiliation retaliation doctrine."[104] The court also relied on the Supreme Court's ruling in *Waters* to conclude that the focus of judicial inquiry should the government employer's subjective belief.[105] The court declared that employers should remain liable for factual mistakes that form the basis for their actions.[106]

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96. *See id.* at 1093–94 (discussing the Supreme Court's political patronage jurisprudence). Interestingly, the court in *Gann* used a test that almost identically resembled the test for a free-speech claim. *See id.* at 1093 ("Once a plaintiff proves political patronage was a substantial or motivating factor behind his dismissal, the burden of persuasion shifts to the defendant to prove, as an affirmative defense, that the discharge would have occurred regardless of any discriminatory political motivation." (citing Mason v. Okla. Tpk. Auth., 115 F.3d 1442, 1452 (10th Cir. 1997)).

97. *See* Welch v. Ciampa, 542 F.3d 927, 938–39 (1st Cir. 2008) (recognizing claims based on perceived political affiliation).

98. 542 F.3d 927 (1st Cir. 2008).

99. *Id.* at 933–34.

100. *Id.* at 939.

101. *See id.* The Court explained:

> We recognize that a plaintiff's active support of a candidate or cause may help the plaintiff meet her evidentiary burden of showing that the adverse employment decision was substantially motivated by her political affiliation. But neither active campaigning for a competing party nor vocal opposition to the defendant's political persuasion are required.

Id. (citation omitted) (citing Acevedo–Diaz v. Aponte, 1 F.3d 62, 69 (1st Cir. 1993)).

102. 702 F.3d 286 (6th Cir. 2012).

103. *Id.* at 299–300.

104. *Id.*

105. *Id.*

106. *See id.* at 302 ("An employer that acts upon such assumptions regarding the affiliation of her employees should not escape liability because her assumptions happened to be faulty.").

However, as a matter of law, other jurisdictions still require a showing of actual First Amendment conduct.[107] In *Jones v. Collins*,[108] the Fifth Circuit denied a perceived conduct claim because the plaintiff denied exercising First Amendment rights.[109] The court there, after citing *Waters*, stated that First Amendment suits must be based on actual conduct.[110] Additionally, the Ninth Circuit, in *Wasson v. Sonoma County Junior College*,[111] rejected an employee's claim that her termination violated the First Amendment where she admitted an absence of speech.[112] Finding *Waters* only applied to content-based mistakes, the court rejected her claim based on perceived conduct.[113] Thus, while *Waters* may have influenced some courts, other remained hesitant to adopt a perceived conduct approach.

3. The Third Circuit Has Consistently Rejected Claims Based on Perceived First Amendment Conduct

In *Ambrose v. Township of Robinson*,[114] the Third Circuit soundly rejected a claim based on perceived affiliation.[115] Employing the traditional three step test for protected speech,[116] the court remarked that "[p]laintiffs in First Amendment retaliation cases can sustain their burden of proof only if their conduct was constitutionally protected, and, therefore, only if there actually was *conduct*."[117] The court also seized upon a small point made in passing in *Waters* in a markedly different way than the Sixth Circuit in *Dye*.[118] It honed in on a single sentence of *Waters*, which stated that it is not

107. *See, e.g.*, Wasson v. Sonoma Cty. Junior Coll., 203 F.3d 659, 663 (9th Cir. 2000) (rejecting a perceived speech claim); Jones v. Collins, 132 F.3d 1048, 1053 (5th Cir. 1998) (same); Fogarty v. Boles, 121 F.3d 886 (3d Cir. 1997) (same).

108. 132 F.3d 1048 (5th Cir. 1998).

109. *Id.* at 1055.

110. *See id.* at 1053 (citing *Waters* and subsequently requiring the plaintiff to show actual First Amendment expression).

111. 203 F.3d 659 (9th Cir. 2000).

112. *Id.* at 663. The plaintiff's employer mistakenly believed she had written defamatory letters about her boss. *Id.* at 661–62.

113. *See id.* at 663 (distinguishing *Waters* on the grounds that the mistake in *Waters* dealt with whether speech was protected, whereas the mistake in Wasson was the employer's mistake regarding the individual who spoke).

114. 303 F.3d 488 (3d Cir. 2002).

115. *Id*. at 495–96.

116. *See id.* at 493 ("First a plaintiff must show that his conduct was constitutionally protected. Second, he must show that his protected activity was a substantial or motivating factor in the alleged retaliatory action. Finally, the defendant may defeat the plaintiff's case 'by showing that it would have taken the same action even in the absence of the protected conduct.'" (citations omitted) (quoting Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996)).

117. *Id.* at 495 (citing *Fogarty*, 121 F.3d at 890).

118. *Compare id.* (reading *Waters* as foreclosing on the possibility of perceived support retaliation claims), *with* Dye v. Office of the Racing Comm'n, 702 F.3d 286, 300 (6th Cir. 2012) (reject-

necessarily "a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information," the Third Circuit rejected the perceived affiliation approach.[119] Years later, the Third Circuit doubled-down on this position in *Heffernan v. City of Paterson*[120] barring another claim based on perceived affiliation and conduct.[121] Without active support or, at a minimum, explicit neutrality, an affiliation retaliation claim in the Third Circuit could not survive.[122]

III. THE COURT'S REASONING

In *Heffernan v. City of Paterson*, the Supreme Court held that an employee is entitled to seek redress for a retaliatory demotion under the First Amendment where the employee did not engage in protected conduct, but the employer had mistakenly believed the opposite.[123] The Court determined that in the absence of protected First Amendment conduct, the employer's motive for retaliation against an employee should serve as the inquiry for a free speech or political affiliation retaliation claim.[124]

The Court framed the legal issue as whether the police department's factual mistake as to Heffernan's exercise of protected conduct made a "critical legal difference."[125] Initially, the Court repeated the long-recognized standard that the First Amendment generally prohibits government officials from dismissing or demoting employees in response to their exercise of protected First Amendment conduct.[126] Because Heffernan repeatedly denied any formal political affiliation with the Spagnola campaign, however, this situation presented a more complex legal issue than previous cases.[127] If Heffernan's supervisors were correct in their assessment of his conduct, the Court noted that a clear constitutional violation would have existed.[128] Due

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ing the Third Circuit's interpretation of *Waters* and calling its reliance on *Waters*' dicta "disingenuous"). The Sixth Circuit contended that this quote from *Waters* was meant only to apply to the Supreme Court's discussion of whether the employer had a reasonable belief that speech was or was not protected. *Dye*, 702 F.3d at 300 (citing Waters v. Churchill, 511 U.S. 661, 679 (1994)).

119. *Id.* (quoting *Fogarty*, 121 F.3d at 890 (quoting *Waters*, 511 U.S. at 679)).

120. 777 F.3d 147 (3d Cir. 2015) *rev'd and remanded*, 136 S. Ct. 1412 (2016).

121. *See id.* at 153 (refusing "to eliminate a traditional element of a First Amendment retaliation claim—namely, the requirement that the plaintiff in fact exercised a First Amendment right"). The court also foreclosed on a perceived speech standard. *Id.*

122. *Id.* at 154.

123. 136 S. Ct. 1412, 1416 (2016).

124. *See id.* at 1418 ("[T]he government's reason for demoting Heffernan is what counts here.").

125. *Id.* at 1416.

126. *Id.*

127. *Id.* at 1416–18.

128. *Id.* at 1417. The Court also assumed none of the exceptions which allow government employees to condition employment on the basis of certain First Amendment actions were present in this case. *Id.*

to this factual mistake by the police department, the vast body of case law concerning free-speech retaliation provided little guidance.[129]

Relying on *Waters v. Churchill*, the Court held that an employer's motive for the adverse action should be the focal point of judicial inquiry in cases where a factual mistake exists as to whether the employee exercised First Amendment rights.[130] Although *Waters* involved an employer who alleged she reasonably, but mistakenly, believed the employee's speech was unprotected, the Court found the emphasis on employer motive persuasive.[131] Applying this logic, the Court expanded the applicability of *Waters*:

> When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.[132]

In sum, the Court concluded an employer should not escape liability where it would have violated an employee's First Amendment rights, even if the employee had not exercised those rights.[133]

The Court explained that similar retaliations could dissuade other employees from engaging in otherwise protected First Amendment activities.[134] Because this potential chilling effect is present in any First Amendment retaliation suit, the Court sought to establish an employer intent-based rule.[135] The Court also compared this case to the Court's political affiliation jurisprudence by noting that plaintiffs in those cases do not need to show that they have been forced to change their political allegiance to retain employment.[136] Thus, the Court held that Heffernan did not need to show the existence of

129. *See id.* at 1417–18 (distinguishing free-speech retaliation cases from the case at hand based on the lack of any factual mistakes).

130. *Heffernan*, 136 S. Ct. at 1418.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.* at 1419 ("The constitutional harm at issue in the ordinary case consists in large part of discouraging employees . . . from engaging in protected activities.").

135. *Id.*

136. *Id.*

protected conduct[137]; because Heffernan could show an injury from the department's unlawful motives, Heffernan's claim could survive summary judgment.[138]

In a dissenting opinion, Justice Thomas turned to the specific language of the statute to reach the opposite conclusion.[139] First, Justice Thomas noted that nothing in the text of Section 1983 provides a remedy against a public official who attempts, but fails, to violate someone's constitutionally protected rights.[140] The threshold question, in Justice Thomas' opinion, should be whether the employee engaged in protected speech.[141] Justice Thomas believed the inquiry to be at an end once Heffernan denied exercising any constitutional rights.[142] Because of these denials of protected conduct, Justice Thomas argued that these circumstances could not amount to a constitutional claim.[143] According to Justice Thomas, the City of Paterson's attempt to violate Heffernan's constitutional rights "never ripened" because Heffernan did not support the Spagnola campaign.[144]

Furthermore, Justice Thomas criticized the majority's attempt to reframe the central issue to whether the City acted with unconstitutional motives.[145] Admitting that Heffernan suffered an injury in connection with the City's actions, Justice Thomas asserted that this injury is of the wrong brand.[146] Justice Thomas continued to argue that even if the city's motive for demoting Heffernan was unconstitutional, without an actual exercise of the protected rights, its unconstitutional motive cannot rightfully connect to a constitutional injury.[147] Thus, Justice Thomas would have maintained the

137. The Court, however, did leave some questions unanswered. For example, it concluded the opinion by cautioning that a "neutral policy prohibiting police officers from overt involvement in any political campaign" may be constitutionally permissible. *Id.*; *see, e.g.*, U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 551 (1973) (declaring a law that prohibits federal employees from engaging in certain political activities to be constitutional).

138. *Heffernan*, 136 S. Ct. at 1419.

139. *See id.* at 1420 (Thomas, J., dissenting).

140. *Id.*

141. *Id.*

142. *Id.* at 1421.

143. *See id.* ("Demoting a dutiful son who aids his elderly, bedridden mother may callous, but it is not unconstitutional.").

144. *Id.*

145. *Id.* at 1421–22.

146. *See id.* at 1422 ("But harm alone is not enough; it has to be the right kind of harm."); *see also id.* ("The mere fact that the government has acted unconstitutionally does not necessarily result in the violation of an individual's constitutional rights, even when that individual has been injured.").

147. *See id.* ("Even if the majority is correct that demoting Heffernan for a politically motivated reason was beyond the scope of the City's power, the City never invaded *Heffernan*'s right to speak or assemble. Accordingly, he is not entitled to money damages under [Section] 1983 for the nonviolation of his First Amendment rights.").

requirement of actual First Amendment conduct and held that Heffernan did state a cause of action.[148]

IV. ANALYSIS

In *Heffernan v. City of Paterson*, the Supreme Court held that a government employer's decision to discipline an employee based on the perception of First Amendment conduct could still violate that employee's constitutional rights, regardless of whether the employee actually exercised those rights.[149] In reaching this result, the Court strengthened First Amendment protections for public employees and wisely chose to focus on the employer's intent behind their actions rights.[150] While reaching a just result in the instant case, however, the Court could have arrived at this result on firmer doctrinal grounds through a stronger emphasis on its political affiliation jurisprudence instead of its reliance on *Waters v. Churchill*.[151] Moreover, the Court built these enhanced First Amendment protections for public employees on fragile foundations by failing to adequately explain *Heffernan*'s impact on the current retaliation tests and by refusing to explicitly adopt the perceived conduct standard.[152]

A. The Court Correctly Held That Heffernan's Perceived First Amendment Conduct Was Sufficient to Survive Summary Judgment

The Court correctly concluded that the City of Paterson deprived Heffernan of his First Amendment rights by demoting him in response to his perceived political conduct.[153] The Court expanded the protections public employees enjoy by focusing on an employer's motive for acting, rather than the presence of First Amendment conduct.[154] Had the Court held otherwise, public employers would be given free rein to act with unconstitutional motives and achieve illegal ends through a legal loophole of mistaken employee

148. *Id.* at 1423.
149. *Id.* at 1416 (majority opinion).
150. *See infra* Part IV.A.
151. *See infra* Part IV.B.
152. *See infra* Part IV.C.
153. *Heffernan*, 136 S. Ct. at 1416.
154. *See id.* at 1418. The Court held:

> We conclude that . . . the government's reason for demoting Heffernan is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action . . . even if, as here, the employer makes a factual mistake about the employee's behavior.

Id.

exercise of First Amendment rights.[155] Further, the Court reached the correct conclusion because the holding "tracks the language of the First Amendment more closely than would a contrary rule."[156] The Court honored the phrasing of the First Amendment by focusing the judicial inquiry on the government employer's intent, rather than an individual's action or inaction.[157]

Justice Thomas, in contrast, advocated for a rule based on the language of Section 1983.[158] Had the Court adopted Justice Thomas' narrower approach, public employers could discipline employees for engaging in allegedly protected conduct, but if no protected conduct actually existed, the employer's discipline, which was inarguably illicitly motivated, would go unpunished.[159] By grounding the rule in the text of the First Amendment, rather than Thomas' strict statutory construction, the majority strengthened First Amendment protections for public employees.[160]

The majority also recognized the potential chilling effect on future First Amendment conduct of public employees.[161] Retaliation based on First Amendment conduct "discourag[es] employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities."[162] It follows that a factual mistake as to whether the employees

155. Throughout political association jurisprudence, a strong condemnation of government action that indirectly burdens constitutional rights informs the narrative of the Court's opinions. *See, e.g.*, Rutan v. Republican Party, 497 U.S. 62, 77–78 (1990) ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.").

156. *Heffernan*, 136 S. Ct. at 1418.

157. The First Amendment is structured to act as a prohibition on government action. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble"); *Heffernan*, 136 S. Ct. at 1418.

158. *Heffernan*, 136 S. Ct. at 1420 (Thomas, J., dissenting) ("Nothing in the text of [Section] 1983 provides a remedy against public officials who attempt but fail to violate someone's constitutional rights.").

159. For example, consider an employer who wanted to rid the office of politically active environmentalists, and fired an employee based on a faulty assumption that the individual was a member of such a group. Although this motive would be considered illegal, the employee would be without recourse because he had not engaged in the conduct that prompted his termination. Moreover, the rest of the office would thereafter be discouraged from participating in environmentally charged political advocacy, indirectly accomplishing the employer's initial (and likely unconstitutional) goal of ridding the office of these environmentalists. A rule of this nature would contradict the Court's admonition that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." Rutan v. Republican Party, 497 U.S. 62, 77–78 (1990); *see also* Dye v. Office of the Racing Comm'n, 702 F.3d 286, 302 (6th Cir. 2012) ("An employer that acts upon such assumptions regarding the [political] affiliation of her employees should not escape liability because her assumptions happened to be faulty.").

160. *Heffernan*, 136 S. Ct. at 1418.

161. *Id.* at 1419.

162. *Id.* ("The discharge [or demotion] of one tells the others that they engage in protected activity at their peril. . . . The employer's factual mistake does not diminish the risk of causing precisely that same harm." (citation omitted) (citing Elrod v. Burns, 427 U.S. 347, 359 (1976)).

actually engaged in those activities makes no difference; employees will likely still view the adverse employment action as a warning to not exercise their rights.[163] This recognition added both strength to the majority's analysis and teeth to the doctrinal principles going forward.

Furthermore, the Court recognized that this rule would not grant plaintiffs a windfall against their employers, where no protected conduct is at issue.[164] The majority suggested that absent actual employee conduct, employer intent might be more difficult to prove because a plaintiff will need to "point to more than his own conduct."[165] By characterizing the employee's showing as "more difficult" than if conduct were present, the Court indicated that employers would not be unfairly burdened by this rule.[166] Had the Court chosen to adopt Justice Thomas's stricter rule of requiring actual protected conduct in every situation, the scales would undoubtedly be tipped in the government's favor.[167] By suggesting that employers would not be unduly impacted by this rule, the Court wisely noted that plaintiffs will not be able to use *Heffernan* to their unfair advantage.

B. The Court Relied Too Heavily on Waters *and Missed an Opportunity to Merge Association and Speech Claims into a Uniform and Consistent Approach*

1. The Court Placed Improper Emphasis on Waters*, Blurring the Line Between Free Speech and Political Affiliation Jurisprudence*

The Court improperly placed dispositive weight on *Waters v. Churchill* to resolve Heffernan's case.[168] By defining and limiting the issue to whether

163. *See id.* ("The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake."). At oral argument, a number of the Justices showed sincere concern over this potential "chilling" effect and the dangers a system of speech restriction may impose. Transcript of Oral Argument at 25, 48, 51, 53–55, Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016) (No. 14-1280).

164. *See Heffernan*, 136 S. Ct. at 1419 ("We concede that . . . it may be more complicated and costly for the employee to prove his case.").

165. *Id.*

166. *Id.* While the opinion did not state a specific evidentiary standard, the Court implied that employees making claims based solely on employer intent would be subjected to a heightened standard. *See id.* ("In a case like this one, the employee will, if anything, find it more difficult to prove that motive, for the employee will have to point to more than his own conduct to show an employer's intent to discharge or demote him for engaging in what the employer (mistakenly) believes to have been different (and protected) activities.").

167. Justice Thomas would have maintained the requirement of actual conduct and foreclosed the possibility of any suits based on perceived conduct. *See id.* at 1420 (Thomas, J., dissenting).

168. *Heffernan*, 136 S. Ct. at 1418–19 (majority opinion) (declaring that the principles that guided the *Waters* court would inform the resolution of *Heffernan*).

an employer's action based on a factual mistake could nonetheless deprive Heffernan of his constitutional rights, *Waters* appeared controlling to the Court.[169] However, *Waters* only concerned a free speech claim whereas *Heffernan* arguably had elements of both free association and free speech rights.[170] But, at its heart, Heffernan's claim more closely resembled a perceived affiliation claim, rather than a free speech claim.[171] Addressing this speech-association hybrid claim, while simultaneously explaining the impact of the police department's factual mistake, would have created a more substantive and informative opinion. Although this case opens the door for future perceived association cases, treating *Waters* as dispositive of the question in *Heffernan* unfairly ignored the line of stronger, more directly on-point political affiliation cases.[172]

Furthermore, *Waters* dealt with an employer terminating a public employee on the mistaken belief that the employee's speech was unprotected.[173] *Heffernan*, on the other hand, involved a deliberate attempt by a public employer to punish an employee's exercise of First Amendment rights.[174] While the logical connection between the two cases rests on the inquiry as to the impact of a factual mistake, *Heffernan* presented a more egregious example of wrongful government behavior.[175] The Court overinflated the applicability of *Waters* offered because here, unlike *Waters*, the government intentionally sought to discipline Heffernan's perceived political affiliation. Although

169. *Id.* at 1418.

170. Some authority suggests where a case presents mixed questions of affiliation and speech, the Court should conduct both the affiliation-based "reasonableness analysis," as well as the traditional balancing test in *Pickering*. *See* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 719 (1996) (discussing the different approaches in cases involving political association and free speech retaliations). In *Heffernan*, the Court almost avoided addressing the applicability of political affiliation cases all together. *See* 136 S. Ct. at 1417 (noting the Court's political association jurisprudence before focusing solely on the impact of the employer's factual mistake).

171. In fact, his attorneys attempted to stress this fact throughout their briefs, and focused on it almost exclusively at oral argument. Brief for Petitioner at 15–17, 20–22, Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016) (No. 14-1280); Transcript of Oral Argument at 3, 8, 15–17, *supra* note 163.

172. *See infra* Part IV.B.3.

173. Waters v. Churchill, 511 U.S. 661, 664, 677 (1994). Further, the *Waters* plurality essentially only required the employer to have only a reasonable belief that speech was unprotected to escape liability. *See id.* at 682 (Souter, J., concurring) (agreeing with the plurality's rule that "a public employer who reasonably believes a third-party report that an employee engaged in constitutionally unprotected speech may punish the employee in reliance on that report, even if it turns out that the employee's actual remarks were constitutionally protected."). In *Heffernan*, the opposite factual scenario (the department acted based on a perception of protected actions) was present. *Heffernan*, 136 S. Ct. at 1416.

174. *See Heffernan*, 136 S. Ct. 1417 (describing the activities that Heffernan's employer had thought he engaged in were of the sort they could not constitutionally prevent or discipline).

175. *See id.* at 1421 (Thomas, J., dissenting) (describing the department's decision to demote Heffernan as "callous").

Waters did provide the foundation to focus on employer motive, it still recognized the need for actual First Amendment conduct to state a constitutional violation.[176] Furthermore, *Waters* could be read to require plaintiffs to show that their actions were both protected and that the employer acted with knowledge of that fact.[177] Thus, by characterizing *Waters* as solely focusing on employer intent,[178] the Court unwisely stretched the applicability of *Waters*' reasoning to Heffernan's case.

2. Lower Courts Have Inconsistently Interpreted Waters, Exemplifying its Questionable Doctrinal Strength

In the years following *Waters*, lower courts have struggled to apply its rule uniformly.[179] In particular, some courts have seized upon a passage of dicta in *Waters* as grounds to bar plaintiffs from recovery in cases where actual First Amendment conduct admittedly did not exist[180]: "We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information."[181] Courts have routinely used this language to dismiss perceived conduct claims like Heffernan's.[182]

Conversely, the Sixth Circuit in *Dye v. Office of the Racing Commission* explicitly rejected this language, reading the statement in context as relating

176. *See Waters*, 511 U.S. at 668 (reaffirming the traditional requirements for a free speech retaliation claim); *see also Heffernan*, 136 S. Ct. at 1423 (citing *Waters*, 511 U.S. at 681) (noting that the *Waters* plurality required that "the public employee must allege that she spoke on a matter of public concern" to state a claim).

177. *See Waters*, 511 U.S. at 682 (Souter, J., concurring) (concurring with the plurality's ruling that government may not be liable for punishing protected speech where the employer reasonably believed the speech to be unprotected). The plurality in *Waters* stated that inadvertently punishing protected speech does not always establish a constitutional violation. *Id.* at 670; *see also, e.g.*, Wasson v. Sonoma Cty. Junior Coll., 203 F.3d 659, 663 (9th Cir. 2000) (citing *Waters*, but still maintaining the actual speech requirements).

178. *See Heffernan*, 136 S. Ct. at 1418 (majority opinion) ("We conclude that, as in *Waters*, the government's reason for demoting Heffernan is what counts here.").

179. *See supra* Part II.C.

180. *See, e.g.*, Heffernan v. City of Paterson, 777 F.3d 147, 154 (3d Cir. 2015), *rev'd and remanded*, 136 S. Ct. 1412 (2016); Ambrose v. Township of Robinson, 303 F.3d 488, 495 (3d Cir. 2002); Wasson v. Sonoma Cty. Junior Coll., 203 F.3d 659, 663 (9th Cir. 2000); Fogarty v. Boles, 121 F.3d 886, 890 (3d Cir. 1997). *But see* Dye v. Office of the Racing Comm'n, 702 F.3d 286, 299–300 (6th Cir. 2012) (dismissing the Third Circuit's view of *Waters* and calling its application to the First Amendment context "disingenuous").

181. *Waters*, 511 U.S. at 679.

182. *See* Nicholas A. Caselli, Comment, *Bursting the Speech Bubble: Toward a More Fitting Perceived-Affiliation Standard*, 81 U. CHI. L. REV. 1709, 1745–48 (2015) (arguing that the *Waters* dicta has been misapplied by the Third Circuit, ultimately making it harder for public employees to prevail in perceived affiliation cases).

to due process concerns of public employees facing discipline.[183] Most notably, a dissenting opinion from *Dye* expertly identified the problems associated with extending *Waters* beyond its own bounds.[184] There, the dissent argued that *Waters* gives more deference to employers and should not serve as the basis for expanding employees' rights.[185] Further, the dissent argued *Waters* dealt only with speech claims and should not be extended to affiliation cases.[186] Due to this inconsistent interpretation across circuits of *Waters*' central meaning, the Supreme Court erred in its near total reliance on *Waters* to decide Heffernan's case.[187] Similar to *Dye*'s dissent, *Heffernan* could have been decided on firmer doctrinal grounds if the Court applied its political affiliation jurisprudence.[188]

3. Political Affiliation Jurisprudence Should Have Informed More of the Court's Opinion

Although elements of speech inevitably existed in Heffernan's claim, his claim more closely resembled a political affiliation case.[189] The Court could have reached the same result in a much stronger fashion had the majority applied its political patronage and affiliation precedent.[190] Instead, the

183. *See* 702 F.3d 286, 300 (6th Cir. 2012) (finding *Waters* inapplicable and allowing a claim based on perceived affiliation to survive summary judgment).

184. *Id.* at 312–14 (McKeague, J., concurring in part and dissenting in part).

185. *Id.* at 313. This dissent challenged *Waters*' use to favor employee-litigants' rights because *Waters* had the immediate effect of benefitting an employer. *Id.*

186. *Id.* at 313–14. The dissent argued that political affiliation jurisprudence better serves to answer questions involving perceived affiliation. *Id.*

187. Although the Court is permitted to resolve cases this way, this Note contends that the Court should have approached *Heffernan* as a political affiliation case and explicitly adopted a perceived conduct approach. *See* Caselli, *supra* note 182, at 1728–39 (arguing that political affiliation jurisprudence should be the foundation for establishing a perceived affiliation standard).

188. The Court's majority opinion did acknowledge the similarities between Heffernan's case and political affiliation cases by recognizing "we do not require plaintiffs in political affiliation cases to 'prove that they or other employees'" have been forced to change their political affiliations. Heffernan v. City of Paterson 136 S. Ct. 1412, 1419 (2016) (quoting Branti v. Finkel, 445 U.S. 507, 517 (1980)). However, the majority did not delve into these ideas further, which could have provided a clear and sensible extension of the doctrine. *See* Caselli, *supra* note 182, at 1729–31 (advocating for perceived affiliation cases to be decided based on the Supreme Court's political patronage jurisprudence).

189. In actuality, Heffernan's case could best be described as a speech case "intermixed with a political affiliation requirement." O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 719 (1996). Because of this, the Court should have done more than its cursory analysis of the political affiliation test. *See Heffernan*, 136 S. Ct. at 1419 (referencing briefly the political affiliation jurisprudence).

190. Instead of conducting the *Pickering* analysis, when dealing with affiliation claims, courts generally ask only "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

Court began its analysis by articulating the test for speech retaliation cases.[191] Only after ruling that a factual mistake should not bar Heffernan's claim did the Court even mention the possible support coming from political affiliation jurisprudence.[192]

While *Waters* supplied enough support to decide the issue as framed by the Court, political affiliation cases could have provided a stronger justification for the Court to protect Mr. Heffernan's rights.[193] In a typical political affiliation case, "there is no requirement that dismissed [or demoted] employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance."[194] Rather, courts look to the affiliation or non-affiliation of a plaintiff as a motivating factor for the adverse employment decision.[195] The circuits that have recognized perceived affiliation have also not required an active showing of actual political affiliation.[196] Had the Court confined the question to one of political identity, the case could have been resolved on far firmer doctrinal grounds.[197] At a minimum, the Court should have recognized this case's unique intermixing of affiliation and speech and conducted both analyses.[198] Instead, the Court glossed over an affiliation analysis and unfortunately limited the discussion to the impact of a factual mistake in the first part of a *Pickering* speech analysis.[199] By narrowing their analysis to focus on *Waters*, the Court built a fragile foundation for the perceived affiliation doctrine to build on in the future.

191. *Heffernan*, 136 S. Ct. at 1417.

192. *Id.* at 1419.

193. *See* Caselli, *supra* note 182, at 1729–31 (arguing that patronage jurisprudence provides a sound foundation plaintiffs to succeed in a perceived affiliation case).

194. *Branti*, 445 U.S. at 517.

195. *Id.*

196. *See* Dye v. Office of the Racing Comm'n, 702 F.3d 286, 299–300 (6th Cir. 2012) (adopting a perceived political affiliation standard and stating that "although active support for a political group would help an employee meet his evidentiary burden, such a showing is not required in order to guarantee First Amendment protections" (citing Welch v. Ciampa, 542 F.3d 927, 939 (1st Cir. 2008)). The Sixth Circuit also found that *Waters* did not provide the support needed to determine the outcome of a perceived affiliation case. *Id.* at 300.

197. Again, the Court did note the similarity between affiliation cases and the claim Heffernan was attempting to assert. *See Heffernan*, 136 S. Ct. at 1419. Despite this dictum, the Court merely mentioned its political affiliation jurisprudence for secondary support; instead, this Note argues that the Court should have used this case law as the primary basis to decide Heffernan's case.

198. *See* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 719 (1996) (explaining the process of addressing questions involving both speech and affiliation to include both the affiliation doctrine's reasonableness inquiries and a *Pickering* balancing test).

199. *Heffernan*, 136 S. Ct. at 1417–19.

C. The Court Failed to Adequately Explain the Holding or Explicitly Adopt the Perceived Conduct Approach

1. The Court's Analytical Gap Distorted the Current First Amendment Retaliation Jurisprudence Without Adequately Explaining the Impact of Heffernan

Without explicitly adopting a new standard for future First Amendment retaliation cases, the Court created confusion in existing First Amendment retaliation law.[200] After recognizing that speech or conduct beyond the scope of the First Amendment protection does not require a court to look at the government's reason for an adverse employment decision, the Court concluded that "the government's reason for demoting Heffernan" would drive the resolution of the case.[201] Thus, the Court never explained why Heffernan's lack of protected conduct was not dispositive in this case; it merely stated that if an employer acts to punish or prevent protected activity, the employee may challenge the action, even if the employer makes a factual mistake about the behavior in question.[202]

By offering no insight into how the Court bridged this gap, the majority opinion missed a crucial opportunity to decide the case based on more applicable precedent, which would guide courts and litigants in future First Amendment retaliation cases.[203] This analytical gap in the Court's reasoning, while still allowing the court to reach a just result in the instant case, will potentially limit this holding only to cases involving factual mistakes.[204] Had the Court chosen to explicitly adopt the perceived conduct standards,[205] and done away with conduct as a requirement, *Heffernan* may have been a more decisive victory for First Amendment protections.

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200. *See id.* (discussing various First Amendment retaliation cases and explaining why they may or may not apply to the case at bar.).

201. *Id.* at 1418. The Court failed to explain the connection between its conclusion that employer motive was the proper inquiry and its previous reference to *Connick*'s conclusion that "if the employee has not engaged in what can 'be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for [the employee's] discharge [or demotion].'" *Id.* at 1417 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

202. *Id.* at 1418.

203. The Court did note how this factual background may not be common, and that very few cases were directly on point. *See id.* at 1417–18 (noting that foundational cases, such as *Connick*, *Pickering*, and *Garcetti* could not directly guide the narrowly framed issue of factual mistakes).

204. *See id.* at 1417–18 (explaining why the *Connick* and *Pickering* line of cases could not resolve the case because they contained no factual mistake).

205. In fact, the Court only cited one case that recognized a perceived affiliation standard from a lower court, early on and before addressing the substantive issues. *Id.* at 1416–17 (citing Dye v. Office of the Racing Comm'n, 702 F.3d 286, 300 (6th Cir. 2012)).

2. The Potential Effects of Heffernan *on the First Amendment Retaliation Tests*

To prevail in a protected speech retaliation case, "an employee must prove [(1)] that the conduct at issue was constitutionally protected, and [(2)] that it was a substantial or motivating factor in the [adverse employment decision]."[206] After establishing these threshold requirements, courts employ the *Pickering* balancing test and weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[207] Absent certain exceptions,[208] when this balance leans in favor of an employee's First Amendment rights, courts will hold the government liable for its unconstitutional retaliation.[209] After *Heffernan* however, the Court may have created space to fundamentally alter the weight of each prong of the analysis.[210]

By placing employer motive at the center of the inquiry, the Court implied that actual First Amendment conduct may no longer be dispositive when faced with First Amendment retaliation claims.[211] While First Amendment activity may strengthen a plaintiff's case, *Heffernan* suggests that it may not always be necessary.[212] Rather, where actual First Amendment conduct and illicit motive exist, courts may begin *Pickering*'s balancing test with a strong presumption of a constitutional violation.[213] Under *Heffernan*, where

206. Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996).

207. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

208. For example, the Court has held that "government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct." *Umbehr*, 518 U.S. at 675 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). However, *Heffernan* may have rendered this exception meaningless in certain circumstances. *See infra* Part IV.C.3.

209. *See, e.g.*, *Pickering*, 391 U.S. at 568 (describing how to strike the balance between interests to determine whether liability is appropriate).

210. At first glance, this holding may apply to only circumstances where an employer makes a factual mistake. The holding may, however, have placed dispositive weight on the employer's motive behind the employment decision. *See Heffernan*, 136 S. Ct. at 1418 (characterizing the government's motive as dispositive).

211. The Court explained, "[i]f the employer's motive . . . is what mattered in *Waters*, why is the same not true [for Heffernan]? After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan*, 136 S. Ct. at 1418; *see also, e.g.*, *Dye*, 702 F.3d at 299 (suggesting that while active First Amendment conduct may help a plaintiff's case, it is not necessary to guarantee First Amendment protection) (citing Welch v. Ciampa, 542 F.3d 927, 939 (1st Cir. 2008)).

212. *Heffernan*, 136 S. Ct. at 1418–19; *see also Dye*, 702 F.3d at 299 (explaining that party affiliation may help a plaintiff's case, but is not necessary); Branti v. Finkel, 445 U.S. 507, 517 (1980) (holding that "there is no requirement that dismissed employees that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance").

213. *See Heffernan*, 136 S. Ct. at 1418 (distinguishing this case from cases in the past where "the only way to show that the employer's motive was unconstitutional was to prove that the con-

no First Amendment conduct existed, but a plaintiff can still show an employer's "desire to prevent the employee from engaging in . . . activity that the First Amendment protects," courts may disregard the threshold question of whether First Amendment activity existed at all.[214] Using this formulation, the ultimate *Pickering* balance test outcome may depend on whether or not a plaintiff can show an illicit motive on the part of the employer.[215] Finally, by permitting Heffernan's claim to proceed in the absence of protected conduct, the exception allowing employers to escape liability upon showing they would have made the decision without the protected conduct at issue may no longer do any real work.[216] For if the government can show it would have made the same employment decision absent First Amendment conduct, its actions may lack the requisite motive *Heffernan* requires.[217]

To prevail in a political affiliation retaliation case, a plaintiff must show that party affiliation is not a reasonable requirement to perform the job.[218] Plaintiffs do not need to show they changed party affiliation, but only that they faced adverse treatment because of their affiliations or non-affiliations.[219] In the face of a circuit split over whether a claim could be based on a perceived political affiliation,[220] *Heffernan* seems to have opened the door to allow perceived affiliation claims to survive summary judgment.[221] Unfortunately, because of the minimal analysis devoted to political affiliation jurisprudence,[222] it remains unclear how wide the Court actually opened this door.

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troversial statement or activity . . . was in fact protected by the First Amendment."); *see also* Garcetti v. Ceballos, 547 U.S. 410, 444–45 (2006) (Breyer, J., dissenting) ("[J]udges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently depending upon the general category of activity.").

214. *Heffernan*, 136 S. Ct. at 1418.

215. While this holding definitely benefits plaintiffs in Heffernan's position, it may actually make it harder for others to succeed in cases with similar claims but employer motives that are difficult to prove. *See id.* at 1419 (acknowledging that plaintiffs will need to produce more evidence of employer motive where protected conduct does not exist).

216. *See* Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)) (explaining that the government may escape liability if they can show the adverse employment action would have been taken even in the absence of the First Amendment conduct).

217. *Heffernan*, 136 S. Ct. at 1418.

218. *See supra* Part II.B.1. Courts use a "reasonableness analysis" to make these determinations. O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 719 (1996).

219. *See, e.g.*, Branti v. Finkel, 445 U.S. 507, 517 (1980) (explaining that courts do not require a plaintiff to show they actually changed party affiliation).

220. *See supra* Part II.C.3.

221. *See Heffernan*, 136 S. Ct. at 1416 (accepting the case to determine whether the correctness of the Third Circuit's rejection of perceived affiliation claims).

222. *Id.* at 1417–20. The Court devoted the first two paragraphs of their analysis and a handful of sentences later on to these principles, but focused almost entirely on speech retaliations. *Id.*

3. Lower Courts' Initial Readings of Heffernan *Have Demonstrated Confusion Over the Application of the Case*

While courts have not had many opportunities to interpret *Heffernan*, a few cases have demonstrated the strengths and weaknesses of the decision.[223] First, some courts have permitted suits based on employer's mistaken beliefs to survive summary judgment, following *Heffernan*'s central holding.[224] Furthermore, courts have read *Heffernan* to formally recognize claims based on perceived political affiliations.[225] Similarly, in *Fuller v. Brownsville Independent School District*,[226] a federal district court analyzed on the government's subjective belief and motive for acting, rather than the plaintiff's actual affiliations.[227] Conversely, courts have rejected some attempts to extend *Heffernan*, including where the employee, and not employer, made the factual mistake.[228] Moreover, at least one court prevented a *Heffernan* perceived association claim where the employee's actions took place pursuant to his employment duties.[229] Finally, the Eleventh Circuit interpreted *Heffernan* to mean that "the employee must prove an improper employer motive,"[230] but only after showing the presence of protected speech or conduct.[231]

223. *See infra* notes 224–233 and accompanying text.

224. *See, e.g.*, Vale v. City of New Haven, No. 3:11-cv-00632, 2016 U.S. Dist. LEXIS 93635, at *27–29 (D. Conn. July 19, 2016) (citing *Heffernan* to allow a First Amendment based suit to proceed where the employer mistakenly believed the employee reported wage violations to the Connecticut Dept. of Labor); Czapiewski v. Russell, No. 15-cv-208-bbc, 2016 U.S. Dist. LEXIS 93209, at *9 (W.D. Wis. July 18, 2016) (finding no constitutional violation if defendant reasonably believed the speech to be unprotected).

225. *See, e.g.*, Zehner v. Jordan-Elbridge Bd. of Educ., No. 15-3539-cv, 2016 U.S. App. LEXIS 20640, at *12 (2d Cir. Nov. 18, 2016) (stating that *Heffernan* allows for claims to be based on "perceived" rather than actual association); Peterson v. Farrow, No. 2:15-cv-00801-JAM-EFB, 2016 U.S. Dist. LEXIS 88332, at *19–20 (E.D. Cal. July 6, 2016) (recognizing *Heffernan*'s holding as establishing the perceived association claim).

226. No. B: 13-109, 2016 U.S. Dist. LEXIS 95227, at *32–34 (S.D. Tex. May 18, 2016).

227. *See id.* (rejecting plaintiff's First Amendment claims because the defendant did not believe, mistakenly or not, that the plaintiff exercised any First Amendment activity).

228. *See* Hatcher v. Bd. of Trs. of S. Ill. Univ., 829 F.3d 531, 539 (7th Cir. 2016) (rejecting a plaintiff's attempt to state a First Amendment claim in which the employee, not the employer, made a factual mistake about whether the conduct was protected); *see also* Brickey v. Hall, 828 F.3d 298, 308 n.7 (4th Cir. 2016) (stating that *Heffernan* does not apply to factually incorrect employee speech); Zitter v. Petruccelli, No. 15-6488, 2016 U.S. Dist. LEXIS 135656, at *23 (D.N.J. Sept. 30, 2016) (distinguishing *Heffernan* on the grounds that an unfulfilled offer to testify does not amount to speech nor did the government perceive any speech to happen).

229. *See* Hughes v. City of New York, No. 15. Civ. 5629, 2016 U.S. Dist. LEXIS 81982, at *28 (E.D.N.Y. June 23, 2016) (ruling a factual mistake irrelevant because any supposed First Amendment conduct occurred pursuant to the plaintiff's employment duties under *Garcetti*).

230. VanDeWalle v. Leon Cty. Fla., No. 16-10129, 2016 U.S. App. LEXIS 16578, at *9 (11th Cir. Sept. 9, 2016) (quoting Heffernan v. City of Paterson, 136 S. Ct. 1412, 1419 (2016)).

231. *See id.* at *8–10 (describing the test for First Amendment retaliation to require the presence of protected speech, a *Pickering* balance in favor of the employee, and a causal connection between

The Tenth Circuit expressed concern over the uncertain scope of *Heffernan*'s holding.[232] Although this court was able to resolve its case without determining the reach of *Heffernan*, the opinion suggested that more litigation will result, as *Heffernan*'s scope will need to be determined eventually.[233] Because of the potentially narrow and non-specific nature of *Heffernan*'s holding, these inconsistencies will require future attention from the Supreme Court to solidify the First Amendment protections *Heffernan* imperfectly created.

V. CONCLUSION

In *Heffernan v. City of Paterson*, the Supreme Court held that a public employee may challenge his demotion or discharge where the employer acts in retaliation for the exercise of protected First Amendment conduct, even if the employer acted on the mistaken belief that the employee exercised protected conduct.[234] In reaching this just conclusion, the Court both strengthened First Amendment protections for public employees and dispelled notions that the ruling would unfairly burden public employers.[235] Unfortunately, however, the Court placed improper emphasis on *Waters v. Churchill* and instead should have resolved *Heffernan* on firmer doctrinal grounds by conducting a more in-depth analysis of its political affiliation jurisprudence and applying it to the facts of the case.[236] Furthermore, by failing to explicitly adopt perceived conduct standards, the Court's opinion did not explain how *Heffernan* may alter First Amendment retaliation jurisprudence, leaving lower courts the task of attempting to answer this question.[237] In sum, although the Court ostensibly increased First Amendment protections for public employees, it failed to create a stable foundation for future First Amendment retaliation litigants to build upon.

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the speech and the adverse employment action). It appears the Eleventh Circuit did not read *Heffernan* to affect whether actual speech or conduct was required in a First Amendment retaliation suit. *Id.*

232. *See* Bird v. West Valley City, 832 F.3d 1188, 1212–13 (10th Cir. 2016) (expressing confusion relating to "how far the Supreme Court's decision in *Heffernan* extends").

233. *Id.* While the factual scenario in *Bird* closely resembled *Heffernan*, the Tenth Circuit suggested that *Heffernan*'s scope still needs further development. *Id.*

234. *See supra* Part III.

235. *See supra* Part IV.A.

236. *See supra* Part IV.B.

237. *See supra* Part IV.C.